



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

April 18, 2013

Ref: 8ENF-L

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Steve Gunderson, Director
Colorado Department of Public Health
and Environment
Water Quality Control Division
4300 Cherry Creek Drive South
Denver, CO 80246-1530

Response
but file states
"Privileged"

105180

Re: Notice of Proposed Combined Complaint and
Consent Agreement
Docket No. CWA-08-2013-0011

Dear Mr. Gunderson:

Enclosed is a copy of an executed Combined Complaint and Consent Agreement (CCCA) in the matter of Public Service Company of Colorado (Respondent). The United States Environmental Protection Agency (EPA) is proposing to enter into the CCCA pursuant to section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and 40 C.F.R. section 22.13(b) to simultaneously commence and settle administratively a Class II civil penalty action against the Respondent. On September 21-22, 2011, the Respondent discharged dredged and/or fill material into South Clear Creek in Georgetown, Colorado, without a permit, in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which prohibits the discharge of a pollutant unless authorized by a permit issued under section 404 of the CWA, 33 U.S.C. § 1344. While the section 404 program is not a CWA authorized program in Colorado, EPA is providing notice to you pursuant to CWA section 309(a), 33 U.S.C. § 1319(a), because the violations occurred in Colorado. You or your staff may request a conference within forty (40) days of receiving this letter. The conference may be in person or by telephone and may cover any matters relevant to the proposed assessment.

A copy of EPA procedures governing the administrative assessment of civil penalties under the CWA is enclosed for your reference. If you have any questions, the most knowledgeable person on my staff for legal issues is Wendy Silver, Senior Enforcement Attorney, who can be reached at 303-312-6637. The



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Responsive
but file states
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Printed on Recycled Paper

most knowledgeable person on my staff for technical issues is Kenneth Champagne, Section 404 Enforcement Officer, who can be reached at 303-312-6608.

Sincerely,

for *Eddie A. Sierra*
Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

Enclosure:

Combined Complaint and Consent Agreement

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2013 APR 18 AM 11:03

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:

Public Service Company of Colorado
1800 Larimer Street, Suite 1100
Denver, Colorado 80202
Respondent.

**COMBINED COMPLAINT AND
CONSENT AGREEMENT**

Docket No. CWA-08-2013-0011

Complainant, the United States Environmental Protection Agency, Region 8 (EPA or Complainant) and Respondent, Public Service Company of Colorado (Respondent), by their undersigned representatives, hereby consent and agree as follows:

I. STATUTORY AUTHORITY

1. This matter is subject to 40 C.F.R. Part 22. This Combined Complaint and Consent Agreement (Consent Agreement) is entered into by the parties for the purpose of simultaneously commencing and concluding this matter, as authorized by 40 C.F.R. § 22.13(b), and executed pursuant to 40 C.F.R. § 22.18(b)(2) and (3).

2. The EPA has jurisdiction over this matter pursuant to section 309(g)(1)(A) and (2)(B) of the Clean Water Act (Act), 33 U.S.C. § 1319(g)(1)(A) and (2)(B).

II. PARTIES BOUND

3. The Consent Agreement, upon incorporation into a Final Order, applies to and is binding upon Complainant and upon Respondent, and Respondent's officers, directors, agents, successors and assigns. Any change in ownership of the Georgetown Hydro-Electric Generating Station or in corporate organization, structure or status of Respondent including, but not limited to, any transfer of assets or real

or personal property shall not alter any of Respondent's responsibilities under this Consent Agreement unless Complainant, Respondent and the transferee agree in writing to allow the transferee to assume such responsibilities. Additionally, thirty (30) days prior to such transfer, Respondent shall notify Complainant at the address specified in paragraph 35 of this Consent Agreement of the pending transfer.

III. STATEMENT OF THE PARTIES

4. For the purposes of this settlement only, Respondent admits the jurisdictional allegations; however, Respondent neither admits nor denies the specific factual allegations contained herein and makes no admission of any violation of law in entering into this Consent Agreement.
5. Respondent retains the right to controvert in any subsequent proceedings, other than proceedings to implement or enforce this Consent Agreement, the validity of any issue of law or fact set forth in this Consent Agreement. In any proceeding to enforce this Consent Agreement, Respondent waives its right to a hearing before any tribunal to contest any issue of law or fact set forth in this Consent Agreement. Respondent further waives its right to appeal the Final Order in this matter.
6. Complainant asserts that settlement of this matter is in the public interest, and Complainant and Respondent agree that entry of this Consent Agreement and its incorporation into a Final Order without further litigation and without adjudication of any issue of fact or law will avoid prolonged and complicated litigation between the parties.
7. This Consent Agreement contains all settlement terms agreed to by the parties.

IV. GENERAL ALLEGATIONS

8. Respondent is a corporation incorporated under the laws of the State of Colorado. The address of the registered office for Respondent is 1800 Larimer Street, Suite 1100, Denver, Colorado 80202.
9. Respondent is an electric and gas utility provider in Colorado.

10. Respondent is and was at all relevant times a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).

11. At all relevant times, Respondent owned, managed, operated and/or otherwise controlled property known as the Georgetown Hydro-Electric Generating Station, located in Georgetown, Clear Creek County, Colorado (the Site). The Site encompasses the Georgetown Forebay Dam and Reservoir.

12. The Georgetown Forebay Dam has a low-level outlet valve that discharges into South Clear Creek.

13. The low-level outlet valve referenced in paragraph 12 is and was at all relevant times a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14).

14. South Clear Creek is a "waters of the United States" within the meaning of 33 C.F.R. § 328.3(a) and therefore "navigable waters" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7).

V. SPECIFIC ALLEGATIONS

15. At or about 9:30 A.M. on September 21, 2011, Respondent, or persons acting on its behalf, opened the low-level outlet valve on the dam at the Site for the purpose of drawing down the reservoir in order to inspect the valve and obtain information for a future maintenance project. Flow through the valve discharges to South Clear Creek.

16. At approximately 4 P.M. on September 21, 2011, the Clear Creek County Sheriff's Office reported to the 24-hour Incident Hotline of the Colorado Department of Public Health and the Environment (CDPHE) a discharge of mud and silt from the Site to South Clear Creek.

17. At approximately 8:00 A.M. on September 22, 2011, representatives of Respondent met at the Site and observed that the water being drained through the low-level outlet valve to South Clear Creek was clear. Beginning at around 9:30 A.M., they observed increased turbidity in the water being

discharged through the low-level outlet valve to South Clear Creek and, between approximately 10:00 and 10:30 A.M., the representatives partially closed the low-level outlet valve from 30 inches to 6 inches. Respondent's representatives reported that the turbidity ceased almost immediately upon the partial closure of the valve.

18. On September 30, 2011, the U.S. Army Corps of Engineers (Corps) visited the Site and observed areas of newly-deposited sediment along the edges of South Clear Creek.

19. On January 24, 2012, the EPA sent Respondent a Request for Information pursuant to section 308 of the Clean Water Act, 33 U.S.C. § 1318 (First Request for Information), requesting information about the reservoir drawdown.

20. On February 24, 2012, Respondent responded to the EPA's First Request for Information, providing, among things, Respondent's position that any turbidity occurring during the reservoir drawdown was de minimis and that the drawdown event was exempt from regulation under section 404(f)(1)(B) of the Act, 33 U.S.C. § 1344(f)(1)(B), as a dam maintenance activity.

21. On March 26, 2012, the EPA sent Respondent a Second Request for Information pursuant to section 308 of the Clean Water Act, 33 U.S.C. § 1318 (Second Request for Information), seeking additional information about the event and the Respondent's position.

22. On April 25, 2012, Respondent responded to the EPA's Second Request for Information providing, among other things, an estimate of the amount of sediment discharged through the low-level outlet valve and other information related to the event and its position.

23. The EPA disagrees with Respondent's position that the drawdown was de minimis and exempt from regulation under the Act as a dam maintenance activity.

24. On June 28, 2012, the EPA notified Respondent that it was preparing to file an administrative complaint seeking administrative penalties for a claim arising under the Act relating to the unpermitted discharge of pollutants from the dam at the Site.

25. Respondent subsequently agreed to settle this matter with the EPA subject to the reservations in paragraph 4 herein.

26. The mud, silt, turbid water, and sediment referenced in paragraphs 16 - 18 constitute material dredged from the Georgetown Forebay Reservoir.

27. The activities described in paragraph 15, above, resulted in the discharge of dredged material to South Clear Creek.

28. The discharges described in paragraphs 15 - 18, above, were from a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14).

29. The dredged material referenced in paragraph 26 constitutes "pollutants" within the meaning of section 502(6) of the Act, 33 U.S.C. § 1362(6).

30. The Respondent's activities as described in paragraphs 15 and 17, above, constitute the "discharge of pollutants" within the meaning of the definition set forth in section 502(12) of the Act, 33 U.S.C. § 1362(12).

VI. DESCRIPTION OF THE VIOLATION

31. Respondent neither applied for nor received a permit to discharge dredged or fill material into South Clear Creek and has not been authorized by any permit issued under section 404 of the Act, 33 U.S.C. § 1344, to allow unauthorized discharges to remain.

32. The discharges of pollutants from a point source by Respondent into waters of the United States described in paragraphs 15 and 17, above, were carried out without the required permit issued by the

Corps pursuant to section 404 of the Act, 33 U.S.C. § 1344, and, therefore, constitute violations of section 301 of the Act, 33 U.S.C. § 1311.

VII. CIVIL PENALTY

33. Pursuant to section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and after consideration of the facts of this case as they relate to the factors set forth in section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), the EPA has determined that a civil penalty of \$14,400.00 is appropriate to settle this matter, to be paid within thirty (30) days of receipt of the Consent Agreement and signed Final Order issued by the Regional Judicial Officer.

34. Respondent consents and agrees to the assessment and payment of the civil penalty cited in the foregoing paragraph for settlement purposes.

35. Respondent shall pay the agreed upon civil penalty by one of the following methods:

a. **Payment by cashier's or certified check:**

A cashier's or certified check, including the name and docket number of this case, for \$14,400.00, payable to "Treasurer, United States of America," to:

Regular Mail:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Overnight Mail:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

b. **Wire Transfer:**

Wire transfers should be directed to the Federal Reserve Bank of New York with the following information:

ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

c. **On Line Payment:**

This option is available through the Department of the Treasury.

www.pay.gov

Enter sfo 1.1 in the search field.

Open form and complete the required fields.

Copies of the check or record of payment shall be sent to:

Kenneth Champagne
U.S. Environmental Protection Agency (8ENF-W)
1595 Wynkoop Street
Denver, CO 80202-1129

and

Tina Artemis
Regional Hearing Clerk
U.S. Environmental Protection Agency (8RC)
1595 Wynkoop Street
Denver, CO 80202-1129

A transmittal letter identifying the case title and docket number must accompany the remittance and copies of the check.

36. In the event payment is not received by the specified due date, interest accrues from the date of the Final Order, not the due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until payment in full is received (i.e., on the 1st late day, 30 days of interest will have accrued).

37. In addition, a handling charge of fifteen dollars (\$15.00) shall be assessed the 31st day from the due date of the payment, and for each subsequent thirty day period that the debt, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if payment is not received within 90 days of the due date. Payments are first applied to outstanding handling charges, 6% penalty interest, and late interest. The remainder is then applied to the outstanding principal amount.

38. The penalty specified in paragraph 33, above, represents civil penalties assessed by the EPA and Respondent agrees that the penalty shall never be claimed as a federal or other tax deduction or credit.

VIII. OTHER TERMS AND CONDITIONS

39. Failure by Respondent to comply with any of the terms of this Consent Agreement shall constitute a breach of the agreement and may result in referral of the matter to the Department of Justice for enforcement of this Consent Agreement and for such other relief as may be appropriate.

40. Nothing in this Consent agreement shall be construed as a waiver by Complainant of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of this Consent Agreement.

41. Each undersigned representative of the parties to this Consent Agreement certifies that he or she is fully authorized by the party represented to bind the parties to the terms and conditions of this Consent Agreement and to execute and legally bind that party to this Consent Agreement.

42. This Consent Agreement shall be subject to a public comment period of not less than forty (40) days pursuant to section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45. The EPA may modify or withdraw its consent to this Consent Agreement if comments received disclose facts or considerations which indicate that the Consent Agreement is inappropriate, improper or inadequate.

43. If comments received during the public comment period do not require modification or withdrawal by the EPA from this Consent Agreement, the parties agree to submit this Consent Agreement to the Regional Judicial Officer following closure of the public comment period specified in 40 C.F.R. § 22.45 and the period for state consultation specified in 40 C.F.R. § 22.38(b), with a request that it be incorporated into a Final Order.

44. This Consent Agreement, upon incorporation into a Final Order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete, full and final settlement of the civil penalty owed for violations alleged in this Consent Agreement. This Consent Agreement resolves Respondent's liability for federal civil penalties under section 309(d) and (g) of the Act, 33 U.S.C. § 1319(d) and (g), for the violations alleged in this Consent Agreement. This Consent Agreement shall not in any case affect the EPA's right to pursue criminal sanctions for any violations of law whether or not alleged in this Consent Agreement.

45. Each party shall bear its own costs and attorneys fees in connection with all issues associated with this Consent Agreement.

IN THE MATTER OF: Public Service Company of Colorado, Docket No. CWA-08-2013-0011

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8
Complainant

Date: 4-18-2013

for Eddie Q. Sierra
Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

PUBLIC SERVICE COMPANY OF
COLORADO
Respondent.

Date: 3/25/2013

David L. Eves
Name: DAVID L EVES
Title: PRESIDENT & CEO

FaegreBD.com

FAEGRE BAKER DANIELS

USA • UK • CHINA

Lynn M. Kornfeld
lynn.kornfeld@FaegreBD.com
Direct +1 303 607 3697

Faegre Baker Daniels LLP
3200 Wells Fargo Center • 1700 Lincoln Street
Denver • Colorado 80203-4532
Phone +1 303 607 3500
Fax +1 303 607 3600

September 26, 2012

CONFIDENTIAL SETTLEMENT COMMUNICATION

Wendy Silver
Senior Attorney
U.S. Environmental Protection Agency
Region 8
1595 Wynkoop Street (ENF-L)
Denver, CO 80202-1129

Re: Georgetown Forebay Dam Activity

Dear Wendy:

(b) (5)



Potential Response
but marked
"Confidential"

FaegreBD.com

**FAEGRE BAKER
DANIELS**

USA • UK • CHINA

Lynn M. Kornfeld
lynn.kornfeld@FaegreBD.com
Direct +1 303 607 3697

Faegre Baker Daniels LLP
3200 Wells Fargo Center • 1700 Lincoln Street
Denver • Colorado 80203-4532
Phone +1 303 607 3500
Fax +1 303 607 3600

September 26, 2012

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Senior Attorney
U.S. Environmental Protection Agency
Region 8
1595 Wynkoop Street (ENF-L)
Denver, CO 80202-1129

Re: Georgetown Forebay Dam Activity

Dear Wendy:

(b) (5)



(b) (5)

A large rectangular area of the document is completely redacted with black ink. The redaction covers approximately the top third of the page content.A large rectangular area of the document is completely redacted with black ink. The redaction covers approximately the middle third of the page content. There are four small white vertical bars visible within the redacted area, possibly indicating a list or table structure.

I

I I

(b) (5)

I I

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(b) (5)



Wendy Silver

-3-

September 26, 2012

(b)(5) [REDACTED]

[REDACTED]

[REDACTED]

(b)(5) [REDACTED]

[REDACTED]

I have been thinking about you a lot lately, especially since I heard from you last. I hope you are well and happy. I am still working hard at my job, but I always find time to think of my friends.

Percentage of total effort	A. balearicum (%)	A. mediterraneum (%)
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20	10	10
40	20	20
60	40	40
80	70	60
100	95	80

Sincerely,

2m m

Lynn M. Kornfeld

KORLM:galm
Cc: Kristen Carney
Bruce Cotie
Quinn Kilty



Fw: Xcel Energy
Art Palomares

Potentially Responsive
but part of
"Privileged Site"

09/27/2011 09:44 AM

From: Art Palomares/R8/USEPA
To: Kenneth Champagne
History: This message

EPA

Ken and Monica,

(b) (5)

Art Palomares, Director | Water Technical Enforcement

Environmental Justice

"Politics and issues come and go, but in the end, w

orris K. Udall

----- Forwarded by Art Palomares/R8/USEPA

From: Darcy Oconnor/R8/USEPA
To: Art Palomares/R8/USEPA
Cc: Natasha Davis/R8/USEPA/US@EPA
Date: 09/27/2011 08:32 AM
Subject: Fw: Xcel Energy Dam Release

Art - (b) (5)

Thanks!

D

----- Forwarded by Darcy Oconnor/R8/USEPA/US on 09/27/2011 08:30 AM -----

From: "Klarich, Scott" <Scott.Klarich@dphe.state.co.us>
To: Darcy Oconnor/R8/USEPA/US@EPA
Cc: Natasha Davis/R8/USEPA/US@EPA, "Kurz, David W." <David.Kurz@dphe.state.co.us>, "Icenogle, Bret A." <Bret.Icenogle@dphe.state.co.us>, "Morgan, Kelly" <Kelly.Morgan@dphe.state.co.us>, "Jacques, Kelly" <Kelly.Jacques@dphe.state.co.us>
Date: 09/27/2011 08:29 AM
Subject: Xcel Energy Dam Release

Hey Darcy - (b) (5)

Scott Klarich, Unit Manager
Enforcement Unit
Compliance Assurance Section
Water Quality Control Division
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado 80246-1530
Direct Line: (303) 692-3564



Fw: Xcel Energy Dam Release

Art Palomares to: Kenneth Champagne, Monica Heimdal

09/27/2011 09:44 AM

From: Art Palomares/R8/USEPA/US

To: Kenneth Champagne/R8/USEPA/US@EPA, Monica Heimdal/R8/USEPA/US@EPA

History: This message has been replied to and forwarded.

Ken and Monica,

(b) (5)

Thanks!

Art Palomares, Director | Water Technical Enforcement Program | Office of Enforcement, Compliance and Environmental Justice

(303) 312-6053

"Politics and issues come and go, but in the end, we'll all be remembered for the way we treated other people." — Morris K. Udall

— Forwarded by Art Palomares/R8/USEPA/US on 09/27/2011 09:43 AM —

From: Darcy Oconnor/R8/USEPA/US
To: Art Palomares/R8/USEPA/US@EPA
Cc: Natasha Davis/R8/USEPA/US@EPA
Date: 09/27/2011 08:32 AM
Subject: Fw: Xcel Energy Dam Release

Art - could Ken or Monica look into this for CDPHE? I'm fine with them communicating directly with Scott and copying me & Natasha if they prefer.

Thanks!

D

— Forwarded by Darcy Oconnor/R8/USEPA/US on 09/27/2011 08:30 AM —

From: "Klarich, Scott" <Scott.Klarich@dphe.state.co.us>
To: Darcy Oconnor/R8/USEPA/US@EPA
Cc: Natasha Davis/R8/USEPA/US@EPA, "Kurz, David W." <David.Kurz@dphe.state.co.us>, "Icenogle, Bret A." <Bret.Icenogle@dphe.state.co.us>, "Morgan, Kelly" <Kelly.Morgan@dphe.state.co.us>, "Jacques, Kelly" <Kelly.Jacques@dphe.state.co.us>
Date: 09/27/2011 08:29 AM
Subject: Xcel Energy Dam Release

Hey Darcy - (b) (5)

Scott Klarich, Unit Manager
Enforcement Unit
Compliance Assurance Section
Water Quality Control Division
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado 80246-1530
Direct Line: (303) 692-3564

7.

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US Army Corps
of Engineers

REGULATORY GUIDANCE LETTER

No. 05-04

Date: August 19, 2005

SUBJECT: Guidance on the Discharge of Sediments From or Through a Dam and the Breaching of Dams, for Purposes of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899

1. Purpose and applicability

a. Purpose. The purpose of this document is to provide guidance to Corps Districts Engineers regarding which releases of sediments from or through dams require Department of the Army (DA) permits. Nothing in this guidance is intended to require a DA permit for routine high water flow dam operations that allow sediment-laden waters to flow from or through a dam; however deviations from normal dam operations resulting in the discharge of bottom sediment may require a DA permit.

b. Applicability. For purposes of Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899 (RHA), this guidance applies to the releases of water and water-carried sediment that may result in the transportation, reduction, or elimination of bottom sediment accumulations from or through dams. Dams, as used in this guidance include, but are not limited to, barriers that create impoundments of water. Depending on factors discussed below with regard to exempted maintenance activities and de minimis impacts, these releases may or may not result in a regulated discharge of dredged material. Regulated discharges may occur in association with the breaching of dams but do not include breaching that results solely from acts of nature.

2. Background

a. Sediment transportation in a stream or river is a natural process that helps to maintain the geomorphology of a stream channel. However, when a dam is constructed on a stream, it tends to interrupt the natural transportation of sediments, which build up behind the dam. This can result in sediment-starved sections of a stream downstream of a dam, leading the stream to down cut or erode away its bed and banks. Sediment accumulation behind a dam also reduces the capacity of a reservoir to store water, and can interfere with operation of the dam.

b. Sediment may be removed from a reservoir basin using many different mechanical methods, including draglines, bulldozers, or other equipment. Sediment that has been removed by such mechanical means can then be transported to a site above the Ordinary High Water Mark (OHWM) of the reservoir and stabilized. Under certain specific circumstances and when authorized by a DA permit, such sediments can be re-introduced into (i.e., discharged into) the river below the dam.

c. If a dam operator modifies or deviates from normal operation of the dam in such a manner that bottom sediment accumulated behind a dam could be removed and transported downstream through the dam, either deliberately or accidentally, that activity may require a DA permit pursuant to Section 404 and/or Section 10, as explained further below. (Note: CWA Section 404(f) exemptions from the permit requirement may apply in situations where only CWA jurisdictional waters are involved). DA permits may require special conditions minimizing the potential adverse effects on the downstream aquatic environment of releases of sediments subject to DA regulation. For example, the discharge of sediments through a dam that allows those sediments to be washed downstream may, in some circumstances, provide beneficial sediment material to sediment-starved sections of a stream below the dam. However, sediments proposed for discharge through a dam may also be of the wrong type to benefit a stream (e.g., mud or fines as opposed to gravel). Such fine sediments can seriously degrade important aquatic habitat, as when silt or mud sluiced through a dam covers up spawning areas for fish at critical times in their lifecycles, or fills in niches for invertebrates in large cobble bottom systems. Sediments proposed to be discharged through a dam may also be out of sync with the natural pre-dam sediment flow regime of that stream, which historically moved much of the sediment in the stream immediately before, during and after high flows such as spring run-off. The uncontrolled discharge of sediments may kill thousands of fish due to the impairment of their ability to process oxygen. The natural, pre-dam flow regime originally produced the stream channel geomorphology, so much of the stream biota is adapted to that historic pre-dam flow regime and sediment load and size.

d. One recent court case specifically addressed the need for a DA permit for sediment sluicing activities. The case of Greenfield Mills v. Macklin originated when employees of the Indiana Department of Natural Resources sluiced large quantities of accumulated sediments through a dam into the river below the dam without having first obtained a DA permit under CWA Section 404. Before deciding the case, the U.S. Court of Appeals for the Seventh Circuit asked the U.S. Department of Justice (DOJ) to provide the consensus views of the Federal Government (i.e., of the U.S. EPA and the Corps of Engineers) regarding whether the sluicing of sediments through the dam under consideration in that case required a DA permit. The DOJ provided an Amicus Curiae brief to the Circuit Court as requested, and the Court in large measure based its decision on the legal positions that the Federal Government presented in that brief. The Amicus brief may be found at http://www.usace.army.mil/inet/functions/cw/cecwo/reg/02-1863_005.pdf. Both the Federal Government's brief and the Court of Appeals decision clearly hold that the sluicing of sediments through the dam constituted hydraulic dredging and the discharge of dredged material from a point source (i.e., the dam), which occurred when the dam's lower gates were opened and the bottom sediments were sluiced downstream. The discharge of dredged material under those circumstances was an activity that required a DA permit pursuant to Section 404 of the CWA, unless that discharge was exempt from the Section 404 permit requirement under CWA Subsection 404(f).

e. These types of discharges of sediments may also be potentially regulated as fill material. Final revisions to the CWA Section 404 Regulatory Program definitions of "fill material" and "discharge of fill material" were issued in the final rule of May 9, 2002. That final rule defined "fill material" in both the Corps and EPA regulations as material placed in waters of the U.S. where the material has the effect of either replacing any portion of a water of the U.S. with dry land or changing the bottom elevation of any portion of a water. Based on this "effect" determination, DA permits are generally required for the discharge of sediments from dams when such activities would have the effect of raising the bottom elevation of the downstream waters to a discernible, substantial degree. For example, when accumulated sediments are discharged through a dam by opening the lower gate(s) of the dam to move substantial

quantities of sediments, that discharge could reasonably be expected to raise the bottom elevation of the downstream waters, thereby constituting the discharge of fill material into that water body.

3. Types of Discharges

a. Discharges that are not regulated. Even when using the upper or middle gates of a dam to release water, some sediment is always included in suspension in the water releases. However, the release of sediments that are incidental to normal dam operations (i.e., the release of water through the dam to provide irrigation water or drinking water, to provide water for downstream depth for navigation, to restore reservoir capacity to store spring run-off or potential flood waters from storm events, etc.) are considered de minimis discharges of dredged material. For purposes of the Corps regulatory program, these de minimis discharges of suspended bottom sediments generally do not trigger the need for a DA permit so long as they are consistent with those sediment loads entering the reservoir from the upstream waters.

b. Applicability of 404(f) Exemptions. The discharge of large quantities of sediment through a dam will rarely (if ever) qualify as exempt from CWA regulation under CWA Subsection 404(f), for the reasons explained at length in the Greenfield Mills decision. (Note: There are no statutory exemptions that apply to such large-quantity discharges of sediments for purposes of the Section 10 permit requirements in Section 10 waters.) In summary, CWA Subsection 404(f)(1) exempts from CWA regulation "... the discharge of dredged or fill material ... for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures, such as ... dams" unless the discharge is "recaptured" under Subsection 404(f)(2) (emphasis added). Consequently, the discharge of sediments through a dam cannot be exempted from CWA regulation under Subsection 404(f)(1) unless those sediments must be released for the purpose of dam maintenance, and not for any other purpose such as maintenance of the reservoir pool. Moreover, as a general rule, the Subsection 404(f) exemptions are construed narrowly to avoid their misapplication as well as the resultant adverse environmental impacts, either site-specific or cumulative. As the Greenfield Mills decision explains, for the discharge of sediments to qualify for the Subsection 404(f) exemption for dam maintenance, such discharges of sediments through a dam would have to be both necessary to allow essential dam maintenance to occur, and would have to be proportional to the dam maintenance activities that necessitate the release of sediments. Given the fact that sediments that have accumulated behind a dam can usually be removed practicably and more precisely by mechanical means, with little or no serious adverse downstream environmental effects, it is rarely necessary to sluice substantial quantities of sediments through a dam in order to accomplish essential dam maintenance. The Subsection 404(f) exemption will rarely, if ever, be applicable to the discharge of large quantities of sediments through a dam.

c. Discharges requiring DA permits. As stated above, sediment frequently builds up behind a dam. At times, rather than remove such accumulated sediments by mechanical means, a dam operator may open the bottom gates of the dam, allowing water to flow at high velocity over the sediment and flush it downstream. This can result in significant amounts of accumulated bottom sediment from upstream of the structure being allowed to move downstream with a composition or at a time period that is inconsistent with the viability and health of the downstream system. Discharging large amounts of

sediments through a dam may not be planned, but may result when the sediment is mobilized due to

increased water releases through a dam when the reservoir pool is low. Similarly, when a dam is breached, it generally causes the sediment behind the dam to be eroded rapidly, usually in a discrete (single) event or a series of discrete events, which move the sediments downstream.

Regardless of whether the dam operators had the intent to discharge sediment through the dam and out of the water impoundment, the opening of the lower gates of the dam has the effect of allowing substantial quantities of sediment material to travel downstream, thereby constituting the discharge of dredged material (and possibly fill material, as well) from a point source, thereby requiring a DA permit.

4. Analysis and Policy

a. As a general rule, the discharge of substantial quantities of accumulated bottom sediment from or through a dam into downstream waters constitutes a discharge of dredged material (and possibly of fill material) that requires a CWA Section 404 permit. The discharge of substantial quantities of sediment through a dam will rarely, if ever, qualify as exempt under 404(f). Such activities may also require a DA Section 10 permit if they occur in "navigable waters of the United States", and no statutory exemptions apply to Section 10 for such discharges into navigable waters. This policy includes the human-induced breaching of dams when sediment has accumulated in the reservoir basin and is released downstream.

b. Activities that are not usually considered regulated discharges of dredged material and do not require DA permits include actions such as the operation of continuously sluicing structures that mimic the natural increase and decrease of sediment in a stream (i.e., the amount of sediment discharging from or through a structure is comparable to the amount of material entering the reservoir from upstream); breaching or removal of a dam that results in the movement of only de minimis amounts of material or that results solely from an act of nature; releases during times of high water or flood stages for purposes of passing flood waters through the dam; and the lowering of lake or pond levels that results in the release of only de minimis amounts of sediment.

It should be noted that there is often high variability in the amount of sediment and water carried by rivers and streams over an annual cycle. Such high flows may occur as a result of storm runoff or seasonal runoff of melting snow pack. Larger amounts of sediment may be considered de minimis in relationship to location of the dam and the normal amount of erosion in the watershed, and thus may not require DA authorization. This guidance does not propose to set a specific amount of sediment that could be considered de minimis or "more than de minimis". When evaluating whether any discharge is de minimis, or may be exempt from the Section 404 permit requirement under CWA Section 404(f)(1) exemption for dam maintenance activities, District Engineers should consider whether the discharge of dredged or fill material through the dam is necessary for dam maintenance, and proportional to the proposed activity and the size of the facility (i.e., size of the dam/structure and the surface acres and storage volume of the resulting impoundment). Other factors in this consideration should include the time of year and normal seasonality of high volume flows, the size of incoming and outgoing stream/river and the intended release volume, the natural hydrograph of the system, the speed of the drawdown, the normal amount of sediment in the watershed, and the potential for environmental harm. These factors should be documented as part of the decision regarding whether a DA permit will be required for the proposed release of sediments through a dam or would have been required in after-the-fact evaluations.

c. On a case-by case basis, District Engineers may consider the need to reduce the level of the reservoir through one or more flood gates and the resultant discharge of dredged material downstream, to


avoid potential catastrophic dam failure, to be an emergency subject to the emergency permitting procedures found at 33 CFR 325.2(e)(1). Sluicing through a dam of less than 25 cubic yards of material may be authorized under Nationwide Permit 18, if all other conditions of that nationwide permit are met. Districts may also consider developing Regional General Permits for larger amounts of sediments to be released through a dam, if such Regional General Permits would include appropriate conditions to protect the environment and the overall public interest. Small impact releases of sediments might possibly be authorized under Nationwide Permit 23 if an agency has an approved Categorical Exclusion.

d. When discharging sediment from or through a dam or breaching a dam, reasonable measures should be implemented to reduce potential harm to downstream waters. Reasonable measures include, but are not limited to, prior dewatering by pumping or by releasing water from the upper control structures on a reservoir; mechanical dredging or excavation of sediments and appropriate disposal; timing releases to coincide with high water periods for better dilution; more frequent flushing to keep the discharges small; releasing a sediment amount that is dependent on the amount of water flow; and installing temporary barriers to prevent exposed sediments from being transported by runoff from subsequent storm events.

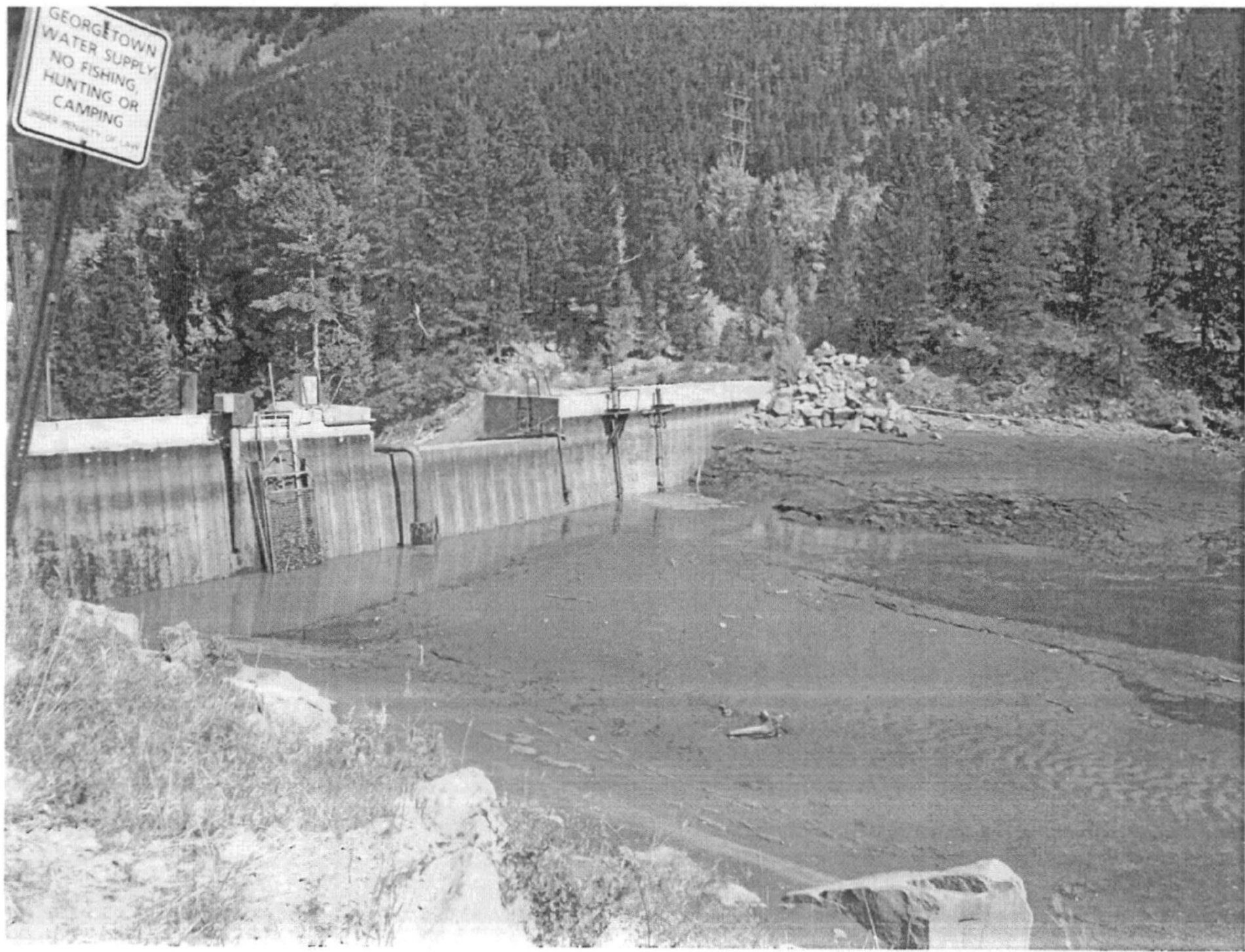
6. Duration

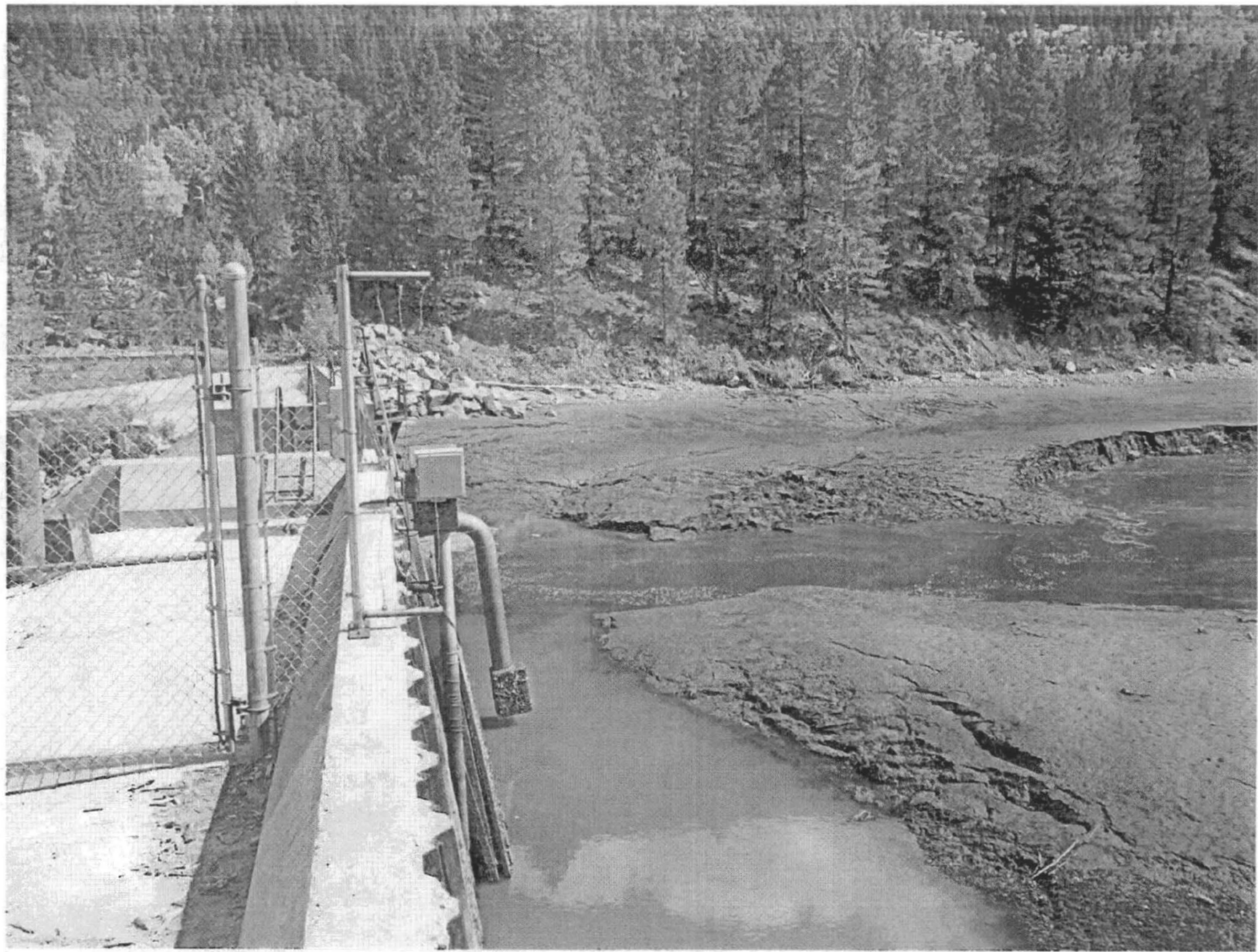
This guidance remains effective unless revised or rescinded.

FOR THE COMMANDER:

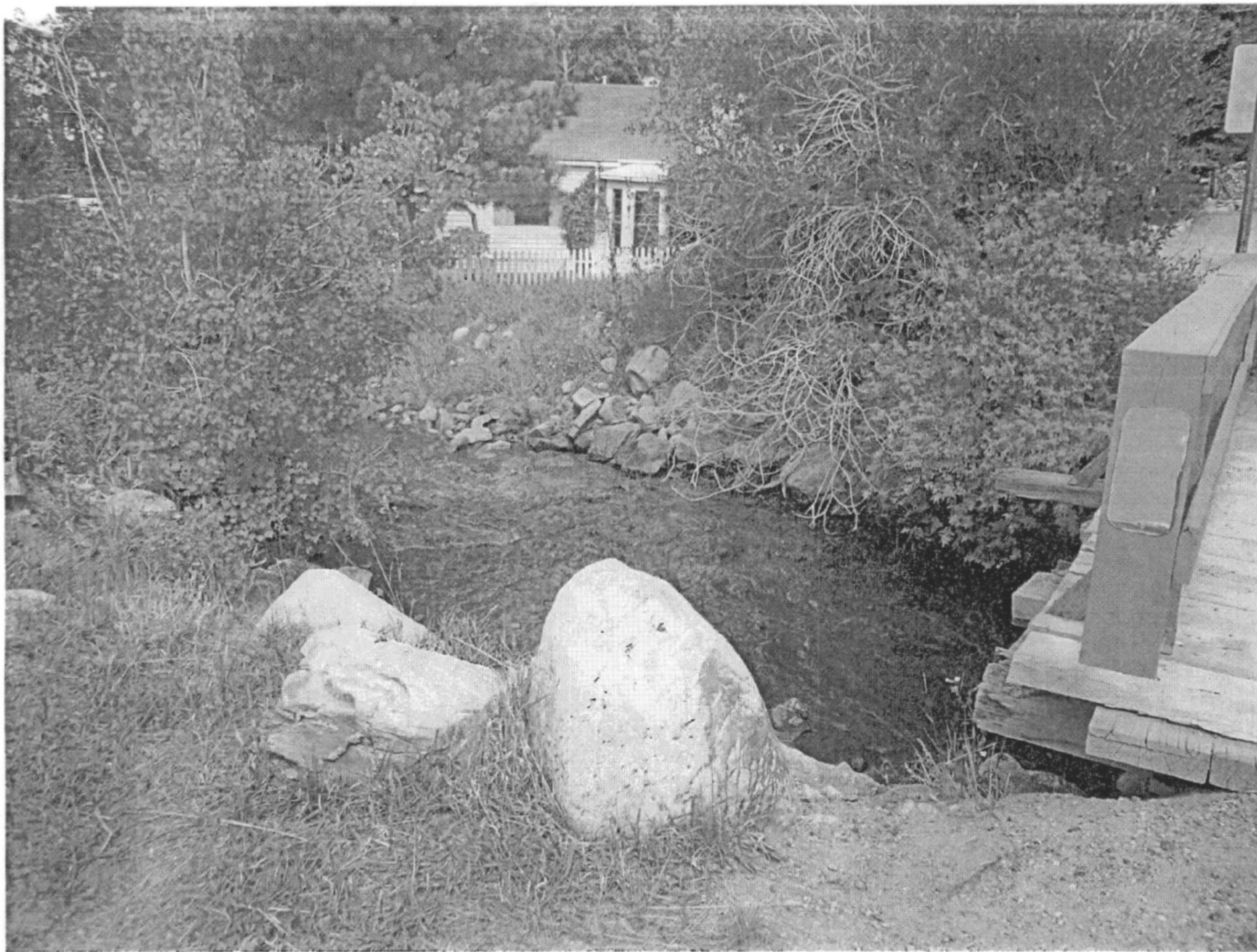

DON T. RILEY
Major General, US Army
Director of Civil Works

GEORGETOWN
WATER SUPPLY
NO FISHING,
HUNTING OR
CAMPING
UNDER PENALTY OF LAW











(b) (5)



(b) (5)





Scanned Document
terry.a.mckee to Kenneth Champagne

10/03/2011 02:37 PM

From: terry.a.mckee@usace.army.mil
To: Kenneth Champagne/R8/USEPA/US@EPA

1 attachment



document2011-10-03-153516.pdf

Please see the attached document.

McKee, Terry A NWO

From: Carey, Timothy T NWO
Sent: Tuesday, September 27, 2011 10:05 AM
To: McKee, Terry A NWO
Subject: FW: Xcel Energy Dam Release (UNCLASSIFIED)
Attachments: USACE - Guidance on the Discharge of Sediments From or Through a Dam.pdf; Xcel Dam Release.pdf

Classification: UNCLASSIFIED
Caveats: NONE

Terry - (b) (5) DPP

Tim

-----Original Message-----

From: Champagne.Kenneth@epamail.epa.gov [<mailto:Champagne.Kenneth@epamail.epa.gov>]
Sent: Tuesday, September 27, 2011 9:59 AM
To: Carey, Timothy T NWO
Cc: Heimdal.Monica@epamail.epa.gov
Subject: Fw: Xcel Energy Dam Release

Tim,

Good morning. (b) (5) DPP

Thanks much,

Kenneth Champagne
U.S. Environmental Protection Agency
Region 8
Section 404 Enforcement Program
p. (303) 312-6608
f. (303) 312-7518

From: "Klarich, Scott" <Scott.Klarich@dphe.state.co.us>
To: Darcy Oconnor/R8/USEPA/US@EPA
Cc: Natasha Davis/R8/USEPA/US@EPA, "Kurz, David W." <David.Kurz@dphe.state.co.us>, "Icenogle, Bret A." <Bret.Icenogle@dphe.state.co.us>, "Morgan, Kelly" <Kelly.Morgan@dphe.state.co.us>, "Jacques, Kelly" <Kelly.Jacques@dphe.state.co.us>
Date: 09/27/2011 08:29 AM
Subject: Xcel Energy Dam Release

Hey Darcy - (b) (5) DPP

(b) (5) DPP

(b) (5) DPP

nt.

Scott Klarich, Unit Manager
Enforcement Unit
Compliance Assurance Section
Water Quality Control Division
Colorado Department of Public Health and Environment 4300 Cherry Creek Drive South Denver,
Colorado 80246-1530 Direct Line: (303) 692-3564
Fax: (303) 782-0390
In-State Toll Free: (800) 886-7689 (Ask for Scott Klarich)
E-Mail: scott.klarich@state.co.us

><(((2>`...><(((2> ..`...><(((2>

(See attached file: USACE - Guidance on the Discharge of Sediments From or Through a
Dam.pdf)(See attached file: Xcel Dam Release.pdf)

Classification: UNCLASSIFIED
Caveats: NONE

E/NWD-2011-2043-DEN
File Number

Received by: Terry M'Kee Letter ☐ Date: Sept 30, 11 Site visit
Office: DRO In Person ☐
By Phone ☐ Time: _____
EMAIL ☒
Complainant's name: Colo. Dept of Health + Environment
Complainant's address: Scott Klarich

Zip Code: _____

Complainant's phone (incl. area code): _____

Location of complaint: D.S. of Excel DAM (Georgetown Forebay)

Waterway: South Clear Creek Bank: _____

Mile: _____ County: Clear Creek State: CO

_____ of _____ of sec. _____, T. _____ - _____, R. _____ - _____

Latitude: 39.691870 Longitude: -105.697827

Nature and details of complaint: Dewatering the Xcel dam
which resulted in a sediment load to the South Fork
Clear Creek. Stream was flowing clear with some areas of sediment
along the stream edge at slow areas of flow. Photos by Tom Hale.

Complainant requested confidentially: ☐ Yes ☒ No ☐ Unknown No permits
Type of alleged violation: ☐ Sec. 10 ☐ Sec. 13 ☒ Sec. 404 issued for the
☐ Other (specify) _____ sediment discharge

Alleged violator(s): _____ Phone (Incl. _____
Name: Christine Johnston area code) 303 571 7089

Address: Public Service Co. of Colo, 1800 Larimer St.
Suite 1300, Denver, CO Zip Code: 80202

Permit on file for above location: ☒ Yes ☐ No ☐ Pending

Permittee name: Public Service Co. of Colo Public Service Co. of Colo

Permit No. 1996-80385 200380335

Permit is for above activity: ☐ Yes ☒ No

Previous Complaint on file: ☐ Yes ☒ No

Complaint No. _____

INITIAL COMPLAINT
MROOP-N, Monitoring & Surveillance Section

Em ~~del~~ dam work permit

The Town of Georgetown

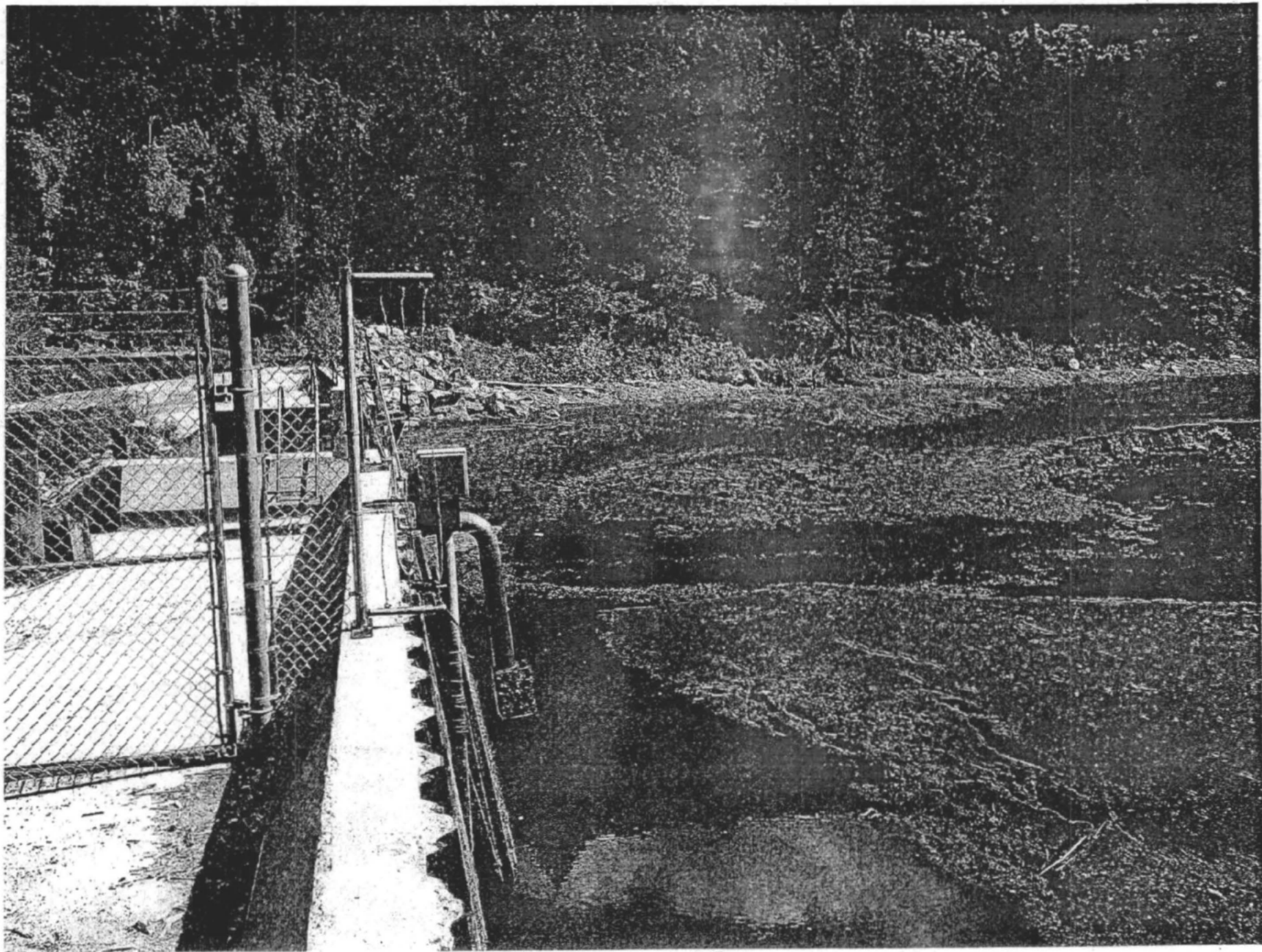
404 6th St. • P.O. Box 426 • Georgetown, CO 80444-0426



Thomas H. Hale
TOWN ADMINISTRATOR

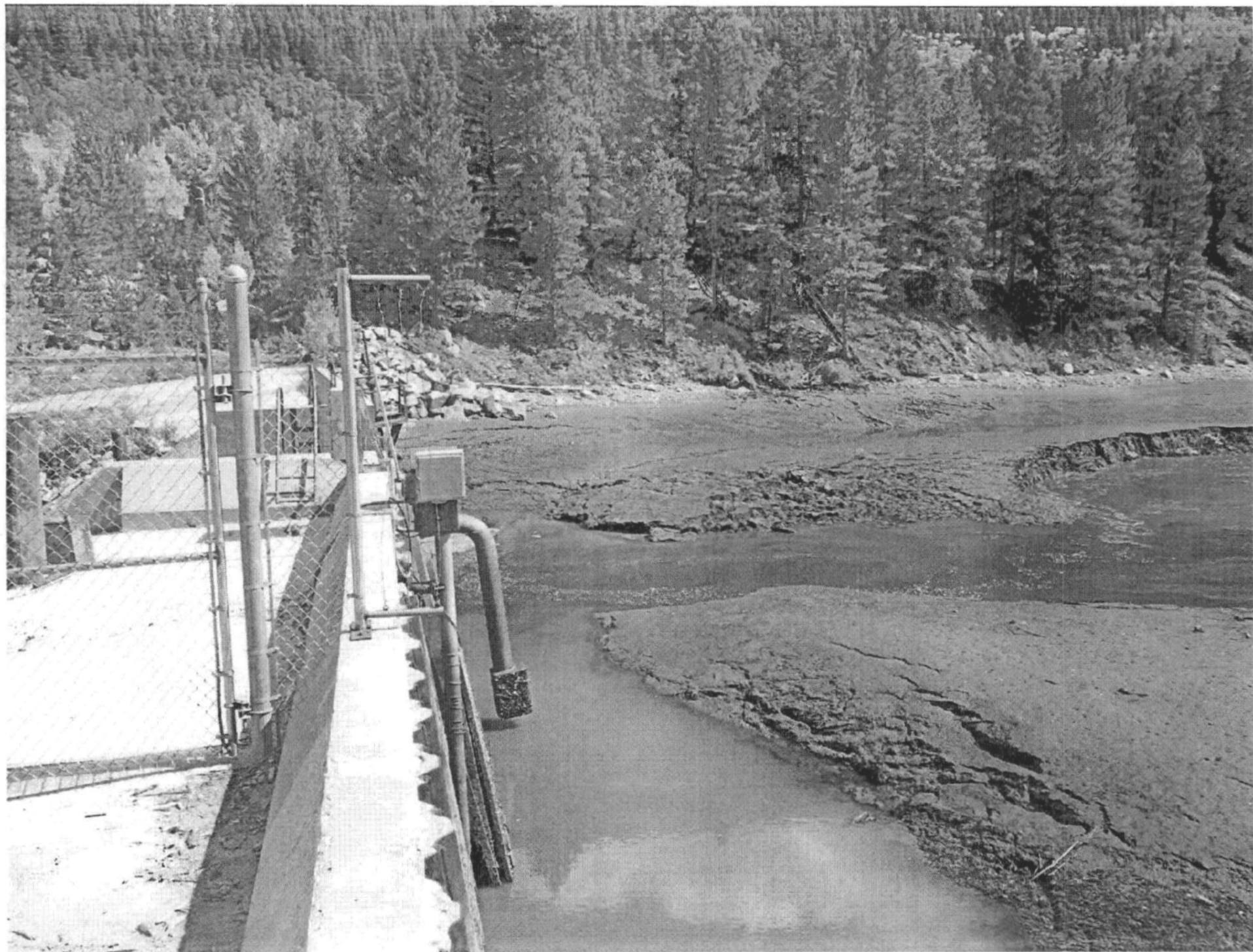
e-mail: gtownadmin@earthlink.net
www.town.georgetown.co.us

(303) 569-2555 ext. 3
CELL: (303) 726-4477
FAX: (303) 569-2705



Decatur Dam

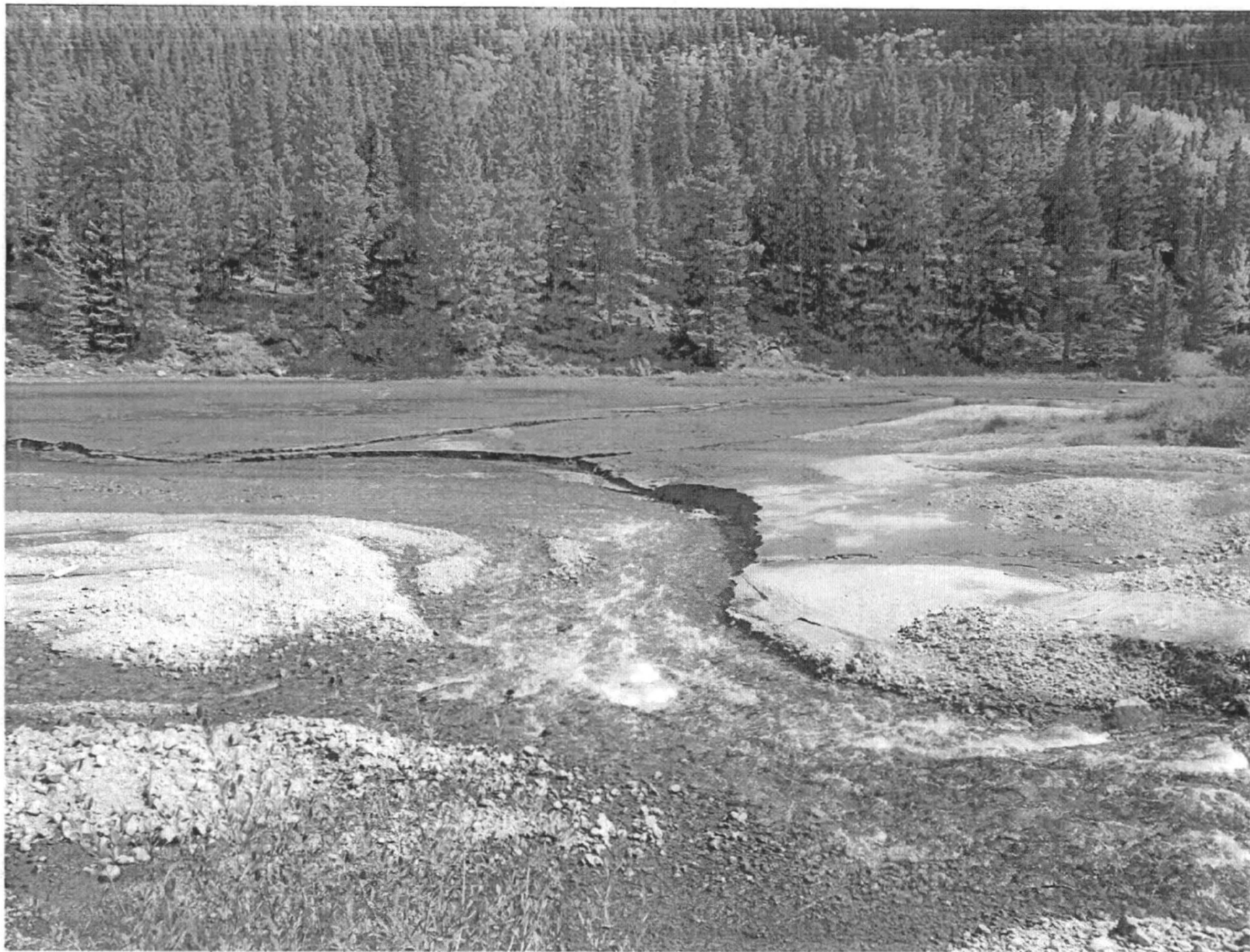




Reservoir Dam ←



Reconstr outlet diminish Sediment Discharge



day Prior to Sept 27, 2011 UPStream of DAM in the reservoir



Sediment load So. Clean Creek
day prior to Sept 27, 2011

Sediment 3" deep at edge of Stream



R. McKee Riddle St. Bridge

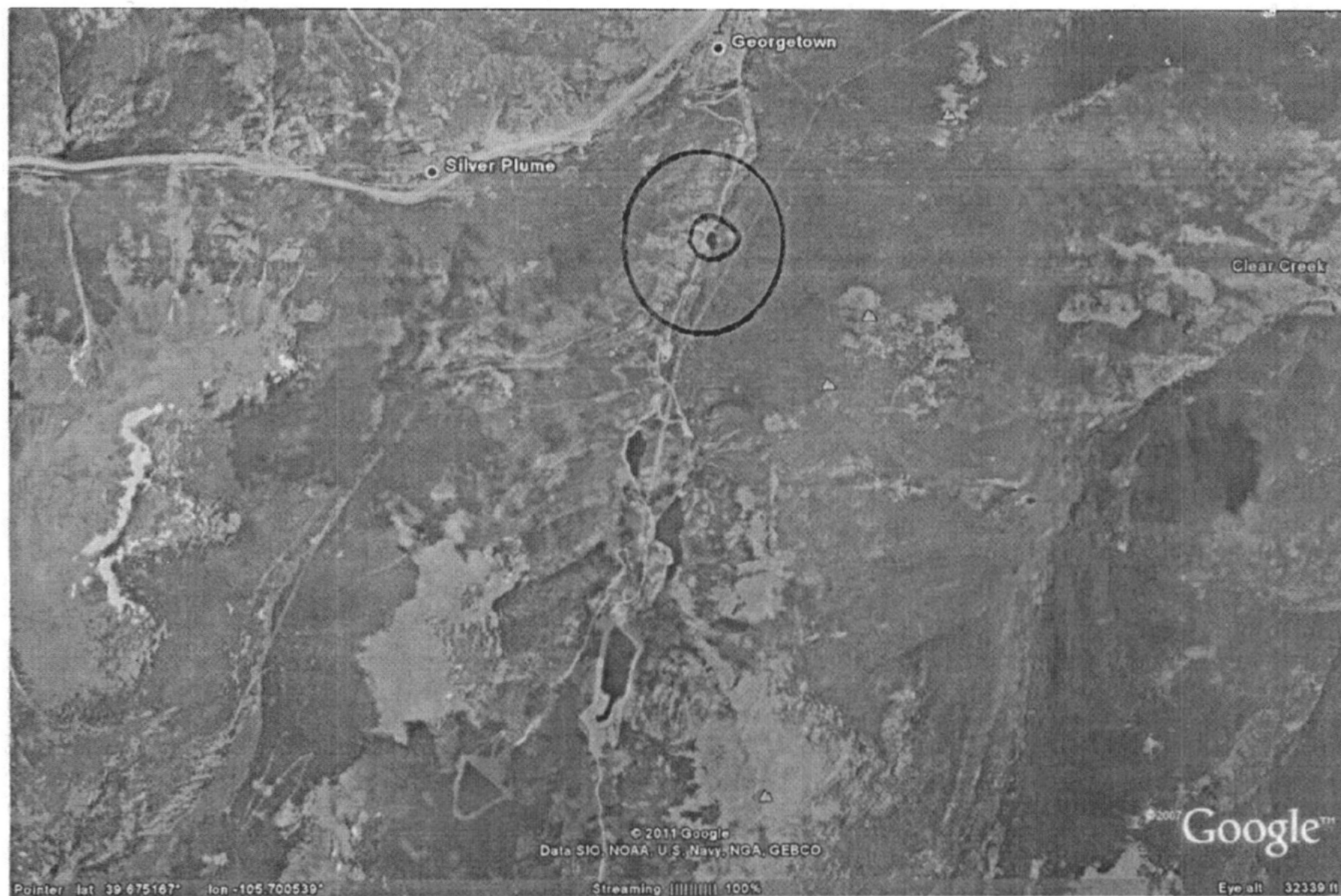
Sept 30, 2011

example of sediment at edge of stream



flow of stream is clear

Sept 30, 2011 Biddle et al.



Xcel DAM
Clear Lake

RECEIVED

OCT 05 2011

Office of Environmental
Compliance & Environmental Justice